IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SHARON REYNA,
Appellant.

No. 2 CA-CR 2018-0039
Filed November 20, 2018

Appeal from the Superior Court in Graham County
No. CR201600186
The Honorable Michael D. Peterson, Judge

AFFIRMED IN PART;
VACATED IN PART

COUNSEL

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By Elizabeth M. Hale
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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Vásquez and Judge Eppich concurred.

E S P I N O S A, Judge:

¶1 Sharon Reyna appeals her convictions and sentences for transportation of a dangerous drug for sale, possession of a dangerous drug for sale, possession of a dangerous drug, and possession of drug paraphernalia. For the following reasons, we vacate Reyna's convictions and sentences for possession of a dangerous drug for sale and possession of a dangerous drug, but otherwise affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdict. *State v. Delgado*, 232 Ariz. 182, ¶ 2 (App. 2013). In March 2016, Reyna was pulled over by a Safford Police Department patrol officer for failing to display a valid license plate registration tag. During the stop, Reyna displayed signs of intoxication. She was arrested on suspicion of driving under the influence and an inventory search was conducted on the vehicle, which was registered to Reyna's daughter. The inventory revealed a women's coat with an eyeglass case in a pocket. Inside the case was "a clear plastic bag of what [the officer] believed to be" methamphetamine and a "glass smoking device" or "meth pipe."

¶3 At the police station, Reyna's blood was drawn pursuant to a warrant and both her blood and the items found in the coat were sent to a crime lab for testing. The eyeglass case was determined to contain approximately twenty-eight grams of methamphetamine, and Reyna's blood also showed the presence of that drug.

¶4 Reyna pled guilty to driving under the influence and driving with a drug in the body, both misdemeanors, and was subsequently tried before a jury on the above-mentioned drug charges. A.R.S. § 28-1381(C). Before trial, she filed a motion in limine to preclude all evidence related to her DUI charges, which the trial court granted in part and denied in part. The court found the blood evidence admissible, explaining it was "not

proof of the substantive charge" but "[i]f somebody has meth[amphetamine] in their system" but disclaims knowledge of that same drug in their vehicle, the blood is "evidence of her knowledge."

¶5 At trial, the phlebotomist who drew Reyna's blood was unavailable to testify due to scheduled surgery that day and his written report was not introduced at trial. The state instead presented a forensic scientist from the Arizona Department of Public Safety's toxicology section to testify regarding the tests she performed on Reyna's blood sample. On cross-examination, defense counsel questioned the forensic scientist about the volume of the sample, which she admitted was "pretty low," and potential problems caused by chemical additives in the sample.

¶6 Reyna was convicted on all charges and sentenced to concurrent prison terms, the longest of which were ten years. We have jurisdiction over her appeal pursuant to Article VI, § 9 of the Arizona Constitution, A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Blood Evidence

¶7 Reyna first argues the trial court erred "when it admitted the blood evidence related to the DUI charge." To be admissible, evidence of other crimes, wrongs, or acts must be "offered for a proper purpose" under Rule 404(b), Ariz. R. Evid., and be "relevant to prove that purpose." *State v. Anthony*, 218 Ariz. 439, ¶ 33 (2008). Further, its probative value must not be "substantially outweighed by unfair prejudice."[1] *Id*. Although "evidence of other crimes . . . is not admissible to prove the character of a person in order to show action in conformity" with that character, it is admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b). We review the court's admission or exclusion of evidence for an abuse of discretion. *State v. Robinson*, 165 Ariz. 51, 56 (1990).

¶8 Reyna relies almost exclusively on *State v. Torres*, 162 Ariz. 70 (App. 1989), contending the blood evidence was only "admitted to show a tenuous link" between her and the methamphetamine. In *Torres*, the defendant was charged with possession of a narcotic drug after being seen getting into a suspected drug dealer's car and throwing a small amount of

[1] Additionally, an objecting party is entitled to an appropriate limiting instruction regarding Rule 404(b) evidence upon request, *State v. Gulbrandson*, 184 Ariz. 46, 60-61, (1995), but Reyna did not do so.

heroin into a parking lot as he ran from undercover police officers. 162 Ariz. at 72. Once apprehended, the defendant told an officer he "had used [heroin] in the past but was not presently doing so." *Id*. The trial court denied a motion to preclude admission of the statement after "finding the evidence relevant to show that the defendant 'knew what he was dealing.'" *Id*.

¶9 On appeal, this court noted that while evidence that "tends to show a disposition toward criminality from which guilt on this occasion is to be inferred" is inadmissible, that same evidence is admissible if it "establishes guilt in some other way." *Id*. at 73. We held the prior heroin use inadmissible because "simply nothing in the case [brought] into play any issue of motive, knowledge, intent, absence of mistake, or accident." *Id*. Rather, the evidence of the defendant's prior drug use "was relevant for only one purpose—to show that because the defendant had once at some unspecified time in the past used heroin, he must have been in the car for the purpose of purchasing the drug on this occasion." *Id*.

¶10 Unlike in *Torres*, Reyna's blood was not evidence of drug use at "some unspecified time in the past," but rather showed contemporaneous use of the very drug she was charged with transporting. In *State v. Mosley*, our supreme court reasoned that because the state was required to establish the defendant's knowledge as an essential element of the charged crimes, evidence of prior narcotic use fell within the "well-recognized exceptions" to the general prohibition on prior bad acts evidence. 119 Ariz. 393, 399 (1978). The court held "evidence of prior narcotics use [is] relevant and admissible to show [defendant's] knowledge of the nature of the substances in question and [defendant's] intent to possess them." *Id*. Likewise, the blood evidence here was introduced to establish Reyna knowingly possessed and transported the methamphetamine, a proper purpose under Rule 404(b).

¶11 Reyna asserts, however, that the blood evidence "was not factually or conditionally relevant to charges of possession and transportation with intent to sell." Evidence is relevant if it "has any tendency to make a fact more or less probable than it would be without the evidence." Ariz. R. Evid. 401(a); *see also State v. Shepherd*, 27 Ariz. App. 448, 449 (1976) ("As a general rule, evidence is relevant if it has any basis in reason to prove a material fact in issue."). The threshold for relevance "is not particularly high," *State v. Oliver*, 158 Ariz. 22, 28 (1988), and requires "only a modicum of rationally probative force," *Hawkins v. Allstate Ins. Co.*, 152 Ariz. 490, 499 (1987).

¶12 Here, the state was required to prove Reyna knowingly transported methamphetamine for sale. A.R.S. § 13-3407(A)(7); A.R.S. § 13-3401(6)(c)(xxxviii). Reyna claims "the mere use of a drug does nothing to shed light on the knowing *mens rea* required for a conviction on the possession and transportation charges," and to allow the state to "rely on this . . . [evidence] flings wide the door for allowing the jury to convict her based on that prior bad act alone and allows the state to gain a conviction without having actually proved the essential elements of its case." We disagree. To be deemed relevant, "evidence need only alter the probability, not prove or disprove the existence, of a consequential fact." *Hawkins*, 152 Ariz. at 496. Even arguably tenuous evidence, from which the jury could reasonably infer a probability that Reyna was aware of the methamphetamine in the truck, was therefore relevant to the state's case against her. *See State v. Paxson*, 203 Ariz. 38, ¶ 17 (App. 2002).

¶13 Reyna further claims the blood evidence "was unfairly prejudicial and encouraged the jury to make a finding of guilt on an improper basis" and therefore should have been excluded under Rule 403, Ariz. R. Evid. While a trial court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice," Ariz. R. Evid. 403, evidence is not unfairly prejudicial simply because it is "adversely probative." *State v. Schurz*, 176 Ariz. 46, 52 (1993). Rather, "unfair prejudice" is an "undue tendency to suggest decision on an improper basis, such as emotion, sympathy[,] or horror." *State v. Escalante-Orozco*, 241 Ariz. 254, ¶ 48 (2017), *abrogated on other grounds by State v. Escalante*, 245 Ariz. 135, ¶ 15 (2018). "Because '[t]he trial court is in the best position to balance the probative value of the challenged evidence against its potential for unfair prejudice,'" it has broad discretion to make that determination. *State v. Connor,* 215 Ariz. 553, ¶ 39 (App. 2007). Reyna's argument that the blood was introduced "for the dubious purpose" of showing that "because she used meth she must have known that there was meth in her car" depends on her underlying claims that the blood was admitted for an improper purpose and was irrelevant, arguments with which we have already disagreed. Accordingly, Reyna has not demonstrated the trial court abused its broad discretion in admitting the blood evidence.

¶14 Reyna lastly argues that in making its Rule 403 determination, the trial court erred by "failing to provide an on-the-record balancing of the prejudicial and probative value of the DUI blood evidence." But she made no request for such findings below and has therefore waived the issue absent fundamental error. *See Escalante*, 245 Ariz. 135; *In re Commitment of*

Jaramillo, 217 Ariz. 460, ¶ 18 (App. 2008) (failing to request express Rule 403 findings waives issue on appeal). And because Reyna has not argued fundamental error on appeal, the issue is waived in its entirety. *State v. Torres*, 233 Ariz. 479, ¶ 9 (App. 2013) (although appellate court will not ignore fundamental error, the issue is otherwise forfeited if not raised on appeal).

Confrontation Clause

¶15 Reyna next asserts "the Confrontation Clause was violated when the state presented blood evidence . . . that showed indicia of potential contamination . . . and failed to present the phlebotomist who collected the blood for cross-examination." We review de novo challenges to admissibility of evidence under the Confrontation Clause. *State v. King*, 212 Ariz. 372, ¶ 16 (App. 2006).

¶16 The Confrontation Clause of the Sixth Amendment bars "testimonial statements of a witness who did not appear at trial unless he was unavailable to testify and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 36 (2004). In *Crawford*, the Supreme Court "emphasized that the Confrontation Clause is directed primarily to testimonial hearsay statements." *State v. King*, 212 Ariz. 372, ¶ 19 (App. 2006). It "applies to 'witnesses' against the accused—in other words, those who 'bear testimony.'" *Crawford*, 541 U.S. at 51. Should forensic analysis be introduced at trial, "the analysts' affidavits [are] testimonial statements, and the analysts [are] 'witnesses' for purposes of the Sixth Amendment." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

¶17 Citing language from *Melendez-Diaz*, Reyna asserts the defense "needed to be able to question the phlebotomist on [any] irregularities to test his 'honesty, proficiency, and methodology.'" While it is true that "a defendant is entitled to be confronted at the trial with all witnesses whose testimony is offered against [her]," *McCreight v. State*, 45 Ariz. 269, 271 (1935), Reyna argues without authority that "[i]n the context of confrontation, the state must present the defendant with an opportunity to cross-examine the actual witness that created the particular evidence sought to be introduced." But because no testimony or report by the phlebotomist was offered against Reyna at trial, her rights under the Confrontation Clause were not implicated and there was no constitutional error.

¶18 Finally, Reyna asserts her rights were violated because the defense was "forced" to question the analyst on "the amounts of blood taken, whether such amounts were consistent with what was necessary to perform adequate testing, and whether the coagulant and preservatives added to the blood could have caused problems with the testing." These questions, however, were properly directed to the analyst who had conducted the testing; Reyna fails to explain how testimony from the police phlebotomist would have been more appropriate, even if relevant and noncumulative.

Double Jeopardy

¶19 In its answering brief, the state correctly notes that Reyna's separate convictions for transportation, possession for sale, and possession "based on the single corpus of drugs violate double jeopardy principles, and thus two of the convictions must be vacated." Because "the charged possession for sale is incidental to the charged transportation for sale, it is a lesser-included offense." *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 12 (App. 1998). Possession of a dangerous drug is likewise a lesser-included offense of transportation of a dangerous drug for sale. *State v. Cheramie*, 218 Ariz. 447, ¶ 22 (2008). When multiple convictions are based on a single act, the lesser-included conviction must be vacated. *See State v. Nereim*, 234 Ariz. 105, ¶ 25 (App. 2014); *State v. Jones*, 185 Ariz. 403, 407 (App. 1995).

Disposition

¶20 For the foregoing reasons, Reyna's convictions and sentences for transportation of methamphetamine for sale and possession of drug paraphernalia are affirmed. Her convictions and sentences for possession of methamphetamine for sale and possession of methamphetamine are vacated.